NO. 79-1236

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

FRANK L. CARSON, LAWRENCE HATCHER, and STUART E. MINES,
Petitioners,

V.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY, LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION, and TOBACCO WORKERS INTERNATIONAL UNION,
Respondents.

BRIEF FOR RESPONDENT UNIONS

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No. 79-1236

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

FRANK L. CARSON, ET AL., PETITIONERS

v.

AMERICAN BRANDS, INC., ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT UNIONS

QUESTIONS PRESENTED

1. Whether there is a "case or controversy" within the meaning of Article III of the United States Constitution.

2. Whether the District Court's Order refusing to enter a proposed consent decree is appealable under 28 U.S.C. §§ 1291 or 1292(a)(1).

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BRIEF FOR RESPONDENT UNIONS

STATEMENT OF THE CASE

Petitioners, Frank L. Carson, Lawrence Hatcher and Stuart E. Mines ("plaintiffs") filed this action against respondents American Brands, Inc., t/a The American Tobacco Company ("American"), Local 182, Tobacco Workers International Union ("Local 182"), and Tobacco Workers International Union ("TWIU") (collectively "defendants") on October 24, 1975, in the United States District Court for the Eastern District of Virginia, Richmond Division. Plaintiffs alleged that the suit was brought on behalf of themselves and a class consisting of "all black persons who have sought employment and who are employed or might in the future be employed by the Company's [American's] Richmond Leaf Department . . . ." They alleged violations by defendants of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. and of 42 U.S.C. § 1981 (J.A. 1a-12a). In their respective answers, defendants denied any

violation of the cited statutes and asked that the complaint be dismissed (J.A. 13a-23a).

Pre-trial discovery was pursued by all parties beginning in January, 1976. On January 27, 1976, at a pre-trial conference, an Order was entered by the District Court setting the case for trial to begin on May 2, 1977. Just prior to the final pre-trial conference established by this Order, counsel for plaintiffs, by letter dated March 25, 1977, informed the Court that the parties had settled the liability phase of the litigation and that they wished to discuss the entry of a proposed consent decree at the final pre-trial conference on April 1.

At the April 1 conference, the Court expressed concern that the parties were no longer in an adversary posture and that certain provisions of the consent decree might violate the United States Constitution. The parties were requested to submit memoranda in support of the entry of the proposed consent decree.

After the requested memoranda were submitted, the Court refused to enter the tendered decree by order dated June 1, 1977. On June 24, 1977, plaintiffs filed a notice of appeal from this order (J.A. 57a-58a).

On October 12, 1977, the Court of Appeals for the Fourth Circuit entered an order establishing a briefing schedule. On January 10, 1978, before briefs were due from appellees, defendants informed the Clerk of the Court of Appeals that they had no position on the merits of the appeal, that the appeal was not an adversary proceeding as required by Article III of the United States Constitution and that they, therefore, would not submit briefs unless the Court otherwise ordered (J.A. 59a-60a).

Subsequently, the plaintiffs filed a motion for summary reversal to which the defendants were ordered to respond. Plaintiffs' motion was denied by order entered on January 31, 1978, an order which was later rescinded. Then on March 27, 1978,

the motion for summary reversal was again denied and the clerk was directed to invite the defendants to file a brief addressing the merits of the appeal (J.A. 62a-64a).

After all briefs were submitted, oral argument was heard before a panel of the Court of Appeals on October 3, 1978. While the matter was under advisement, the parties were informed by letter from the clerk dated January 25, 1979, of the panel's concern as to whether it had jurisdiction to entertain the appeal in light of Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978). Counsel were requested to file supplemental memoranda by February 9 (J.A. 65a-66a). After the requested memoranda were submitted, the Court of Appeals, sua sponte, agreed to an en banc hearing of the case without oral argument on June 5, 1979.

On September 14, 1979, the Court of Appeals dismissed the appeal holding that the District Court's refusal to enter the pro-

posed consent decree was not appealable. Carson v. American Brands, Inc., 606 F.2d 420, 425. The mandate of the Court of Appeals issued on October 5, in accordance with Fed. R. App. P. 41.

After informing plaintiffs' counsel by letter that defendants no longer consented to the entry of the proposed decree, the defendants, by motion filed in the District Court on October 10, 1979, requested the Court to hold a pre-trial conference for the purpose of establishing a trial date. In the motion, the defendants stated that they no longer consented to the entry of the proposed decree which had been presented to the Court by the parties on April 1, 1977 (J.A. 67a-68a). On November 2, the parties were notified that this case was again placed on the docket for trial, and that the Court would hold a pre-trial conference on November 15 (J.A. 69a-70a). At this pre-trial conference, the case was set for trial to begin on

February 4, 1980.

Two weeks after this case was set for trial, defendants were served with plaintiffs' application for an extension of time in which to file a petition for writ of certiorari. Thereafter, on December 5, 1979, plaintiffs moved the District Court for a stay of all further proceedings pending disposition of their petition. The requested stay was granted by order dated December 17, 1979.

The petition for a writ of certiorari was granted on June 16, 1980, limited to the question of whether an order refusing to enter a proposed consent decree is an appealable interlocutory order.

ARGUMENT

I. Since The Proposed Consent Decree May Not Now Be Entered By The District Court, The Issue Presented By This Appeal Is Moot.

After having informed counsel for plaintiffs that the defendants no longer

consented to the entry of the proposed decree which had been presented on April 1, 1977, the defendants filed a motion in the District Court on October 10, 1979, requesting a pre-trial conference for the purpose of establishing a trial date. Defendants stated in that motion that they no longer consented to the proposed decree. Plaintiffs filed no memorandum in response to this motion in accordance with Rule 11(F), Local Rules of Practice, nor did they lodge an objection with either the Court or counsel to such withdrawal of consent.

Subsequently, the District Court held a pre-trial conference at which time the case was set for trial to begin on February 4, 1980. Plaintiffs made no objection to this. And, by setting a trial date, the District Court apparently accepted the defendants' withdrawal of consent.

In view of defendants' withdrawal of consent which took place after the decision

of the Court of Appeals, this case is now moot. Since the proposed decree may not be entered by the District Court absent the consent of the defendants, the question of the appealability of the order refusing to enter it in April 1977 is purely academic. This appeal is moot because "there is no subject matter on which the judgment of the Court can operate." Ex Parte Baez, 177 U.S. 378, 390 (1900).

To date, the only suggestion that the defendants may not withdraw their consent to entry of the proposed decree has been made by the United States and the Equal Employment Opportunity Commission in their joint brief (Br. of U.S. at 18, fn. 14). Without citation of authority, Amici contend that, under its terms, none of the parties had the right to repudiate the proposed decree before the District Court had an opportunity to act, though they concede that the parties remain free to argue that the decree should not be

entered "because of unforseeable changed circumstances." Id.

The answer to this argument is that the District Court, under the theory of the Amici, had an opportunity to enter the proposed decree at the time the case was remanded on October 5, 1979. Moreover, both the Court and the plaintiffs did not accept the plain invitation of the dissenting judges in the Court of Appeals to undertake or request a reconsideration of the June 1, 1977, order. 606 F.2d at 432. Not only did the District Court not attempt to enter the proposed decree sua sponte, it was not even presented to the District Court by the plaintiffs. That Court, rather, on a motion of the defendants, held a pre-trial conference and set the case for trial. The Unions contend that the solution proposed in the dissenting opinion is not viable, in any event because it would require an amendment[1] to the

[1] The dissenting judges would require notice be given to members of Class 2. 606 F.2d at 431, fn. 3.

proposed decree to which the defendants, at this stage, have not consented.

In addition, the Unions contend that their right to withdraw consent to the entry of the proposed decree cannot seriously be questioned under the circumstances of this particular case. This Court need not determine, as suggested by the United States and the EEOC (Br. of U.S. at 18, fn. 14) that the question of appealability depends upon the consent of one's adversary, but rather can, and should, decide this case on the facts presented.

The proposed decree recites that the parties were "desirous of resolving all of the issues set forth in the complaint without the time and expense of further litigation . . ." (J.A. 25a) and that the defendants would provide certain relief to a class of plaintiffs "solely for the purposes of the settlement of this case and resolving the issues in the Complaint without the additional

expense of litigation . . ." (J.A. 26a). As a practical matter, the proposed decree has totally failed to achieve the essential purpose of the parties, that is, the avoidance of prolonged litigation. Approximately three and one-half years have passed since this decree was tendered. The parties have thus not avoided litigation and seemingly cannot unless permitted an opportunity to settle this case on terms acceptable to the District Court or to try the case on the merits. In any event, these purposes will not be served or achieved by a determination that the order refusing to enter the proposed decree is, or is not, appealable.

The parties are presently in a position in which performance under the decree is arguably possible, but the value of the plaintiffs' performance, i.e., the withholding of the pressing of their claims, has been virtually destroyed by the refusal of the District Court to enter the decree and by

the subsequent appeals. The defendants and plaintiffs, as well, have not saved the time and expense of protracted litigation, the expressed purpose of the proposed decree. Accordingly, under the doctrine of frustration of purpose, either party has the right to rescind. Williston on Contracts, 3rd Ed., § 1935. Clearly the failure to obtain the entry of the decree for some three and one-half years since its presentation was unforseeable and not the result of the fault of any party. Under these circumstances, any party may be excused from performance. See West Los Angeles Institute for Cancer Research v. Mayer, 366 F.2d 220 (9th Cir. 1966), cert. denied, 385 U.S. 1010 (1967).

Though the defendants' reasons for withdrawing consent to the proposed decree are not in the record, many of them are obvious or readily apparent. The proposed decree was negotiated without the benefit of the Court's decisions in International

Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) and California Brewers Ass'n v. Bryant, ___ U.S. ___, 63 L. Ed. 2d 55 (1980). These two cases have contributed considerably to the state of the applicable law as it existed in early 1977. Given the nature of consent decrees and the type of negotiations which result in them, it is clear that the relative strengths and weaknesses of the parties' cases and the risks of going to trial are entirely different than they were prior to April 1, 1977, when the decree was presented. See, United States v. Armour & Co., 402 U.S. 673 (1971). The Unions' position is that recent developments in the law have put them in a substantially different posture than they were in when the proposed decree was presented, and that their withdrawal from a stale settlement proposal is entirely justified.

The argument of the Equal Employment Advisory Council ("EEAC") relative to the

appealability question under 28 U.S.C. § 1292(a)(1) emphasizes, perhaps unintentionally, the problem with the passage of time as it relates to the parties' evaluation of the risk of litigation. The EEAC argues that once the question of liability is decided by the trial court, it is highly unlikely that the parties or the court would be willing to agree to the terms of the "original consent decree" (Br. of EEAC at 13). This reasoning applies with equal force when a significant period of time has elapsed after agreement to the proposed decree. Just as the risks change after a district court has tried a case and decided the question of liability, the risks have changed here through the passage of time and the development that has occurred in the applicable law.

Implicit in the agreement to a consent decree was the expectation of the parties that the decree would be entered within a

reasonable time after it was proposed to the District Court. In this case, the parties contemplated that the proposed decree would become final within 65 days after tender, which was the time specified therein to provide appropriate notice to members of the class and to give them an opportunity to object pursuant to Fed. R. Civ. P. 23(e) (J.A. 30a-31a). More than three years have passed, however, and the decree has not been entered. By whatever standard is employed, the proposed decree was not made final within a reasonable amount of time after the parties proposed it to the District Court and therefore the withdrawal of consent to its entry in October, 1979, was manifestly justified.

The probable scenario for the immediate future makes the efficacy of the entry of the proposed decree even more unlikely. For example, should the Court hold that this case is not moot and that the June 1, 1977, order is appealable, the case must be remanded to

determine whether the trial court abused its discretion in refusing to enter the decree. If the Court of Appeals agrees with the plaintiffs and remands the case to the District Court for directions to enter the decree, many of its terms will have already expired. If the Court of Appeals should decide that the District Court did not abuse its discretion, the plaintiffs may attempt to return to this Court or they may seek to enter into another agreement with the defendants.

Additional justification for the withdrawal of consent by the defendants is suggested by the United States and the EEOC (Br. of U.S. at 18, fn. 14). These Amici assert that "unforseeable changed circumstances" might be sufficient reason for withdrawing consent. As stated, the assumption held by the parties in April 1977, was that the decree would be entered shortly after its presentation. Nothing could be

more unforseeable than the fact that the parties are now in the Supreme Court of the United States some three and one-half years later. It is all the more remarkable given that the case remains wholly unresolved, that the class of plaintiffs retain whatever rights and claims for relief they may have had at the time their suit was filed in October, 1975 and that, at this time, there is little hope of resolution of this case within the immediate future no matter what the result of this appeal. These serious problems were realized perhaps by the plaintiffs and the District Court at the time this case was set for trial the second time. Apparently, it did not occur to anyone at the November 15, 1979, pre-trial conference that entry of the proposed decree would be appropriate.

Since the defendants do not now consent to the entry of the decree, it may not be entered by the District Court even should

this Court determine the June 1, 1977, order to be appealable. Accordingly, there is not a live controversy with respect to this appeal within the meaning of Article III of the United States Constitution. This controversy is moot. Should the Court conclude that this appeal is not moot, then, in the alternative, the Unions adopt the position of American Brands as set forth hereinafter.

II. The District Court's Order Refusing Entry of a Proposed Consent Decree Is Not Appealable Under The Judicially Created "Collateral Order" Exception to 28 U.S.C. § 1291.

The Unions agree with the position taken in the Brief of Respondent, American Brands, Inc. Accordingly, the Unions will simply summarize that position as follows.

The finality requirement of 28 U.S.C. §1291 represents a legislative judgment that a succession of separate appeals from interlocutory orders would have a delibitating effect on judicial administration. The District Court's order rejecting a proposed consent decree does not come within the

small class of decisions excepted from the final judgment rule by the judicially-created "collateral order" doctrine.

The District Court's order does not satisfy any element of this Court's three-part collateral order test. First, the order did not conclusively determine any disputed question. Even assuming that there is a general right to settle litigation, nothing in the District Court's order precluded settlement at another time by the tendered decree or some alternative consent decree.

Second, the District Court's order did not resolve an important issue completely separate from the merits. Petitioners contend that the important collateral issue is the right to settle a Title VII class action under Weber (United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979)). The Weber opinion, however, was delivered two years after the District Court's order, was not considered by the courts below, and

is encompassed within the questions denied review by the Court in this case. Even assuming that Weber is applicable to settlement among parties in litigation, the District Court's order in this case of necessity involved considerations that were enmeshed in the factual and legal issues comprising petitioners' claims, and so no "collateral" rights were injured by the District Court's order. Furthermore, the importance of the right to settle Title VII actions is no different from the right to settle any other litigation, and a special exception to the final judgment rule for Title VII cases should not be created.

Third, the District Court's order is effectively reviewable, both before and after possible trial, and therefore fails to satisfy the final prong of the collateral order test. The same or alternative consent decree proposals could be presented by the parties for the Court's consideration at any

stage of the litigation. If none are accepted and the parties go to trial, any party could advocate on appeal therefrom the settlement alternative most favorable to its position. In situations where actual final determinations are made to the detriment of legitimate rights, immediate appellate review is available through certification or mandamus. In sum, no irreparable harm would flow from a decision holding the collateral order doctrine inapplicable and postponing the appellate review until final judgment.

III. The District Court's Order Refusing Entry Of The Consent Decree Is Not Appealable Under The Congressionally Created Exception To The Finality Rule, 28 U.S.C. § 1292(a)(1).

The Unions agree with the position taken in the Brief of Respondent, American Brands, Inc. Accordingly, the Unions will simply summarize that position as follows.

28 U.S.C. § 1292(a)(1), the statutory exception to the rule of finality held by

the Court of Appeals below to be inapplicable to the District Court's order rejecting a proposed consent decree, has always received a narrow interpretation by this Court. Postponing appellate review in this case presents no serious, irreparable consequences such as would warrant expansion of § 1292(a)(1).

After rejection of the tendered decree, petitioners remained fully able to obtain injunctive relief through alternative settlement proposals, a motion for injunctive relief, an award of injunctive relief following trial, or through imposition of such relief on appeal. Nothing in the opinions of the courts below foreclosed any of these opportunities to seek and obtain injunctive relief. The District Court's order thus produced no irreparable effect because it could be reviewed both prior to and after final judgment.

Denial of entry raised no serious or irreparable harm for the further reason that it did not dispose of any claims for injunctive relief. The District Court may have expressed an opinion concerning the lawfulness of the tendered decree, but it did not pass on the legal sufficiency of petitioners' claims for injunctive relief in any other form and under any other factual circumstances.

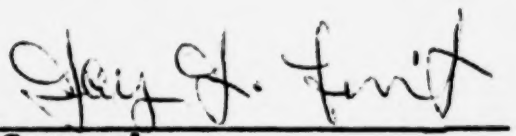
The narrow interpretation accorded § 1292(a)(1) by this Court has often followed from weighing the consequences of postponing appeal against the vital judicial interests militating against piecemeal review. The result urged here by petitioners would create the potential for multiple and unnecessary appeals, interjecting appellate courts indiscriminately into the trial process. The consequences of postponing appeal of an order rejecting a consent decree, on the

other hand, are minimal and remediable both prior to and after final judgment.

CONCLUSION

For the reasons presented, the decision of the Court of Appeals for the Fourth Circuit should be affirmed and the appeal dismissed.

LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION and TOBACCO WORKERS INTERNATIONAL UNION

By 
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